Supreme Court, U.S.
FILED
FEB 16 1993
OFFICE OF THE CLERK

No. 92-998

In The

Supreme Court of the United States

October Term, 1992

ALMA FAYE RUSSELL,

Petitioner,

v.

CITY OF DALLAS AND THE BOARD OF TRUSTEES OF THE FIREMEN, POLICEMEN AND FIRE ALARM OPERATORS' PENSION FUND OF DALLAS, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

BARBARA R. HUNT
208 S. Akard
Room 2900
Dallas, Texas 75201
214/464-7551
Of Counsel

CAROL L. TACKER
208 S. Akard
Room 2900
Dallas Texas 75201
214/464-2219
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY AND OBJECTIONS TO RESPONDENTS' STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

1. Characterization of the Pension Board hearing is a crucial and highly disputed issue of fact 3

2. Respondent misconstrues Petitioner's "extrinsic evidence" argument 4

3. The holding in *Miner v. Stafford* does not support Respondent's retroactivity arguments 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

STATE COURT DECISIONS:

Brown v. Owens, 674 S.W.2d 748 (Tex. 1984) 4, 5

Edwadyne Forbau v. Aetna Life Insurance Co., 36 Tex. S. Ct. Journal 140 (Tex. 1992) 5

Hill v. Evans, 414 S.W.2d 684 (Tex. Civ. App. – Austin 1967) 5

LeCroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986) 5

Miner v. Stafford, 157 N.Ed. 164 (Ill. 1927)..... 3, 6, 7

UNITED STATES SUPREME COURT DECISIONS:

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) 7

REPLY AND OBJECTIONS TO RESPONDENTS' STATEMENT OF THE CASE

Respondents accuse Petitioner of an intentional mischaracterization of fact in her Petition for Writ of Certiorari based upon Petitioner's alleged assertion that "Respondent temporarily" withheld "her survivor benefits and that it was only after an evidentiary hearing pursuant to Section 6.07(d)(3) of Plan B that Respondents finally decided to deny her benefits." Brief in Opposition, p. 1. Petitioner has not mischaracterized facts.[1]

Petitioner has never stated that her benefits were being "temporarily" withheld; nor does the term "temporarily withheld" appear anywhere in Section 6.07 of Plan B. Respondents simply inserted the word "temporarily" into their restatement of Petitioner's position in order to be able to construct an argument that the hearing granted to Petitioner by the Board was not a Section 6.07(d)(3) hearing.

Respondents may now vehemently deny that the hearing granted to Petitioner was a Section 6.07(d)(3) hearing, but there was no such denial in the Board's February 15, 1989 letter responding to Petitioner's request for a Section 6.07(d)(3) hearing, setting a date for Petitioner's hearing.

---

[1] Petitioner did not mischaracterize facts in her Petition. Petitioner's letter requesting a Section 6.07(d)(3) hearing is attached hereto as Exhibit A; the Board's response to that letter scheduling the hearing is attached as Exhibit B; a second letter from the Board announcing a delay in consideration of Petitioner's claim is attached as Exhibit C; and the letter from the Board notifying Petitioner of the Board's final ruling is attached as Exhibit D.

It is certainly true that the Board did not immediately rule on Petitioner's claim at their meeting on March 9, 1989, after hearing Petitioner's arguments and evidence, but deferred its decision to allow the Fund's attorney time to research the issue. See Exhibit C attached hereto. It is certainly true also that the Board considered and denied Petitioner's claim on May 11, 1989. See Exhibit D attached hereto.

Respondent asserts that "all discovery that was requested or sought was completed before summary judgment was granted." Brief in Opposition, p. 4. Plaintiff had filed a Motion to Compel Discovery on February 12, 1991, which was denied. However, the Order specified that "Such denial is without prejudice to Plaintiff's right to re-urge the motion if the pending motion for summary judgment is denied." Order of the Magistrate filed March 8, 1991.

SUMMARY JUDGMENT

First, as demonstrated by the arguments in Respondent's Statement of the case and elsewhere in the Brief in Opposition, both the District Court and the Circuit Court erroneously resolve disputed issues of fact in favor of movant to sustain the Summary Judgment.

Second, Respondent misconstrued Petitioner's "extrinsic evidence" argument. Petitioner was not arguing that the Ballot was outside the record in this case. Petitioner's argument is that determination of the intent of the Members of the Pension Plan when they voted on the amendment to Plan B based upon evidence outside

the terms of the Plan itself constituted resolution of a disputed fact issue in favor of movant.

Third, the court's holding in *Miner v. Stafford,* 157 N.E. 164 (Ill. 1927) does not support Respondent's arguments on retroactivity because that case does not involve a situation where widows who vested at or about the same time are being treated differently as to applicability of a pension amendment.

ARGUMENT

1. Characterization of the Pension Board hearing is a crucial and highly disputed issue of fact.

Whether or not the Pension Board hearing wherein Petitioner challenged the withholding of her benefits is characterized as a "Section 6.07(d)(3) hearing is a crucial issue of fact that was identified by the Board as a disputed fact on May 9, 1991, in their response to the Summary Judgment Motion of Petitioner on her contract cause of action. The Trial Court determined that Petitioner's cause of action accrued on April 26, 1986, when the Board first withheld her benefits because of remarriage. However, if the hearing is correctly characterized as a Section 6.07(d)(3) hearing, then by the terms of the Pension Plan here being construed, the Board's initial act of withholding Petitioner's benefits did not become final until May 11, 1989, by the specific terms of Plan B. Since Petitioner filed this lawsuit on May 10, 1990, it is very clear that no statute of limitations could have run from that operative date of May 11, 1989.

On the other hand, if Respondent's characterization of the hearing is correct, it adds weight to Petitioner's breach of fiduciary duty claim because the Board never gave any indication to Petitioner that they did not consider that hearing to be a Section 6.07(d)(3) hearing, until after Petitioner filed her lawsuit in reliance upon the May 11, 1989 date as the operative date for statutory purposes.

If the Board had notified Petitioner in its February 15, 1989 letter that Plaintiff was not entitled to a Section 6.07(d)(3) hearing, Plaintiff would have been on notice that the Board considered its earlier action final without any hearing. February 15, 1989 was well within the contract statute of limitations date for the initial denial of benefits.

2. Respondent misconstrues Petitioner's "extrinsic evidence" argument.

Petitioner was not arguing that the Circuit Court's reliance upon the Ballot language to determine "legislative intent" was error because that ballot language was outside the record herein. Petitioner was arguing that the question of "intent" is a question of fact, especially in circumstances such as these, and that the Court erred in looking to evidence extrinsic to the terms of the *Plan* itself for the purpose of determining intent. Here, again, a disputed fact issue is being improperly resolved by the Court in favor of the Movant to support a Summary Judgment. In citing *Brown v. Owens*, 674 S.W.2d 748 (Tex. 1984), Respondents appear to be trying to characterize the ballot short form description of the Plan language as a "caption". A "ballot", however, is not a "caption." As is

clear even from the *Brown v. Owens* case, a caption is the descriptive title of an act, indicating the purpose and application of the act. *See also; LeCroy v. Hanlon,* 713 S.W.2d 335, 337-338 (Tex. 1986). Further, in footnote 3 of *Edwadyne Forbau v. Aetna Life Insurance Co.,* 36 Tex. S. Ct. Journal 140 (Tex. 1992), the Texas Supreme Court makes it very clear that the term "caption" is synonymous with the word "heading".

The difference between "captions" and "ballots" is placed in proper perspective in *Hill v. Evans,* 414 S.W.2d 684 (Tex. Civ. App. – Austin 1967, writ ref'd n.r.e.)

The primary question in *Hill v. Evans* was whether "the language of the ballot submitting the proposed amendment under House Joint Resolution No. 13 was sufficient to identify the amendment and to give fair notice to the voter of its intent and subject matter." Id. at 686. The argument in that case was that the ballot language was insuffient because it did not fully disclose all the effects of the actual constitutional amendment.

As is clear from the cases cited above, ballot language does not in and of itself form any part of a statutory provision; it merely directs the voters to the actual provisions of the statute on which they are to cast their vote. Such conclusion is also supported by the record documents in this case. As referenced on page 22 of the Petition, the "Ballot Explanation" directive to the Members referred the members to the actual Plan Amendments. The Plan Amendment for Section 6.07 was set forth as section J of Petitioner's APPENDIX herein. Nowhere in that actual amendment language is there any indication that the amendment is only to apply to widows

still receiving benefits; there is only the introductory description that the amendment "shall apply to all current Plan B active members, retirees, and survivors." Petitioner has at all times met the current Plan B definition of "survivor," even though her benefits were being withheld after her remarriage.

3. The holding in *Miner v. Stafford* does not support Respondent's retroactivity arguments.

The holding in the *Miner v. Stafford* case is that the widow's right to benefits, under the terms of the statutory pension plan there at issue, vested at her husband's death. The court there determined that the statute there being considered was not retroactive, so the widow was denied the increase in benefits provided by the amendment there at issue.

Here, however, Respondent's argue that the amendment to Plan B applies for the benefit of some widows whose benefits vested at their husband's deaths that occurred prior to the effective date of the amendment (those who had not yet remarried), but that the amendment does not apply for others whose rights vested at or about the same time. *Miner v. Stafford* could properly be cited as support for the date of vesting being the date of the husband's death and for the proposition that a non-retroactive statute has no effect on benefits for widows whose rights vested prior to the effective date of the amendment.

In other words, if Respondents were arguing that the amendment to Plan B does not apply for any widow whose husband died prior to the effective date of the

amendment, then *Miner v. Stafford* would support their argument. Here, however, the Board for their own convenience is applying the amendment for the benefit of all widows who were receiving benefits on the effective date of the amendment to allow those widows to now remarry without losing their benefits, but denying such allegedly retroactive application to other widows (such as Petitioner) whose rights had vested at or about the same time. *Miner v. Stafford* provides no support for such analysis.

CONCLUSION

The Respondents did not squarely address the issues raised in the Petition, but instead have demonstrated that this case was decided on the basis of resolution of disputed facts in favor of the movant. Such judicial action goes way beyond the standard set by the Supreme Court for application of summary judgment, endangering the individual right to jury trials of fact issues. As previously argued in the Petition, such decision conflicts with this Court's direction in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). Petitioner relies on the arguments in her Petition and herein to respectfully pray that the Supreme Court of the United States grant certiorari and reverse the

opinions below to return this case to the trial court for a jury trial.

Respectfully submitted,

CAROL L. TACKER
State Bar of Texas
No. 19605600
208 S. Akard, Room 2900
Dallas, Texas 75201
(214) 464-2219

Counsel of Record

EXHIBIT A

BARBARA R. HUNT
ATTORNEY AT LAW
One Bell Plaza • Room 2900 464-7551
P.O. Box 655521 AREA CODE 214
Dallas, Texas 75265-5521

February 3, 1989

Jerry M. Hast, Administrator
Police and fire Pension Fund
City Hall
Dallas, Texas 75201

Re: Request of Alma Faye Russell for her Pension Benefits to be Reinstated

Dear Mr. Hast:

Please be advised that I represent Alma Faye Russell in regard to the above-referenced matter. On behalf of Ms. Russell, and pursuant to Section 6.07(d)(3) of Plan B, I hereby request a hearing before the Board to present testimony why her benefits should be continued.

Please advise me of the time and date for the hearing as soon as possible.

Thank you for your consideration of this matter.

Yours very truly,

/s/ Barbara R. Hunt
Barbara R. Hunt

CC: Mrs. Alma Faye Russell

BRH/ts

EXHIBIT B

Logo
CITY OF DALLAS

February 15, 1989

Barbara R. Hunt
Attorney at Law
One Bell Plaza, Room 2900
P. O. Box 655521
Dallas, Texas 75265-5521

Dear Ms. Hunt:

The Dallas Police and Fire Pension Fund office has received your letter dated February 3, 1989, regarding your request to address the Board of Trustees regarding Alma Faye Russell's request to have her survivor benefits continued. Your request has been placed on the agenda for the Board meeting on Thursday, March 9, 1989. The meeting will be held in room 6 E South, City Hall; 1500 Marilla; Dallas, Texas, beginning at 1:30 p.m. Your request will be considered at approximately 1:45 p.m.

If you have any questions, please contact either Linda Rickley or myself at 670-4267.

Sincerely,

/s/ Jerry M. Hast
Jerry M. Hast, Administrator
Police and Fire Pension Fund

LNR/st

cc: Alma Faye Russell

EXHIBIT C

Logo
CITY OF DALLAS

March 14, 1989

Barbara R. Hunt
Attorney at Law
One Bell Plaza, Room 2900
P. O. Box 655521
Dallas, Texas 75265-551

Dear Ms. Hunt:

At the March 9, 1989 meeting, the Police and Fire Pension Fund Board considered your request, on behalf of Alma Faye Russell, to have her survivor benefits reinstated. The Board deferred its decision in order to allow the Fund's attorney time to research the issue. The Fund's attorney has resigned and the Board is in the process of retaining new legal counsel. You will be notified of the date, time and place of the meeting.

If you have any questions, please contact either Linda Rickley or myself at 670-4267.

Sincerely,

/s/ Jerry M. Hast
Jerry M. Hast, Administrator
Police and Fire Pension Fund

cc: Alma Faye Russell

EXHIBIT D

Logo
CITY OF DALLAS

May 15, 1989

Alma Faye Russell
Rt. 4, Box 49
Lindale, Texas 75711

Dear Ms. Russell:

At the May 11, 1989 meeting, the Police and Fire Pension Board considered your request to have your survivor benefits reinstated. The Board voted to deny your request, based on the plan language which requires that in order to be eligible for the lifetime survivor benefit, you must have been receiving a survivor benefit on April 21, 1988, which was the effective date of the amendment.

The Board directed the staff to determine the number of surviving spouses who might be in the same category as yourself. Once this information is gathered, the Fund's actuary will estimate the cost of reinstating survivor benefits to those persons. Your request for a plan amendment allowing reinstatement of your former benefits will be considered the next time that benefit improvements are evaluated.

You will be notified of the date, time and place of the Board meeting at which the actuary will discuss the estimated costs with the Board.

If you have any questions, please call Linda Rickley at (214) 670-4267.

Sincerely,

/s/ Richard L. Tettamant
for Jerry M. Hast, Administrator
Police and Fire Pension Fund

LNR/st